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961262 FEB 11 1997.

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No.

In The

Supreme Court of the United States

October Term, 1996

ANTHONY VOLPE, III,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. May the warrantless entry and search of Petitioner's home be permitted as an exception to the Fourth Amendment warrant requirement where federal agents, following their execution of a search warrant, learn that Petitioner, whom they suspect of criminal activity, resides in a house nearby but separate from the residence authorized to be searched?

2. Was Petitioner denied due process of law by the failure of the trial court to order the production of a confidential informant whose identity became known to Petitioner and where Petitioner made a substantial preliminary showing of numerous deliberate or reckless material misstatements and omissions by the affiant in a search warrant application?

3. Does the seizure of a collection of weapons from a house where drugs were also found, without more, establish that the weapons were possessed "in connection with" the drugs so as to deny to Petitioner the availability of the "safety valve" provision of 18 U.S.C. § 3553(f) and U.S.S.G. § 5C1.2?

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Petitioner, Anthony Volpe, III, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on November 12, 1996.

OPINION BELOW

The Order of the Court of Appeals for the Third Circuit is not reported. It is attached to this Petition as Appendix A. (1a-2a.) The Orders of the United States District Court for the Eastern District of Pennsylvania have not been reported. They are attached to this Petition as Appendix B to Appendix D. (3a-5a.) The transcription of the oral findings of fact and conclusions of law of the District Court are included in Appendix E. (6a-12a.)

STATEMENT OF JURISDICTION

The Order of the Court of Appeals was filed on November 12, 1996. No Petition for Rehearing was filed in the Court of Appeals. This Court's jurisdiction is invoked under Title 28, U.S.C. § 1254(1). Jurisdiction in the United States District Court for the Eastern District of Pennsylvania was pursuant to 18 U.S.C. § 3231 in that the indictment alleged offenses against the United States committed in that district. The jurisdiction of the Court of Appeals for the Third Circuit rested upon 28 U.S.C. § 1291, this being an appeal from a final judgment of sentencing in a criminal case.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution, which provides, in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .

The Fourteenth Amendment to the United States Constitution, which provides, in pertinent part:

> Nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . .

Title 18 U.S.C. § 3553(f), set forth in Appendix F at page 13a.

U.S.S.G. § 5C1.2, set forth in Appendix F at page 14a.

STATEMENT OF THE CASE

On March 29, 1995 DEA agents secured a search warrant for a trailer at 366 Lake Warren Drive, a rural area in Upper Black Eddy, Pennsylvania.

In the early morning hours of March 30, 1995, a party of law enforcement officers, including FBI agents, DEA agents, and Pennsylvania State Police, descended on 366 Lake Warren Drive. This property is approximately nine acres in size and contains three dwellings: two house trailers, one of which was depicted by photograph in the warrant, and a two story house. The agents believed that the trailer was the residence of the Petitioner, Anthony Volpe, III, whom they suspected was involved in drug offenses. They had no knowledge that there were two other residences on the property.

Upon arrival at the trailer, the agents learned from the occupant that it belonged to and was the residence of Petitioner's

son, Anthony Volpe, IV, and his fiance. They learned that Petitioner lived in a house approximately 200 feet deeper into the property and separated from the trailer by an area so densely wooded that it was virtually invisible from the trailer.

Within moments of their arrival at the trailer and a cursory search of its contents, the agents proceeded to the house in which Petitioner lived. They gained entry by means of deception, telling Mr. Volpe and his companion that they had a search warrant. They did not permit him to see it. They ordered Petitioner to remain seated in the living room, and designated a Pennsylvania State Trooper to stand over him and enforce this order. The agents, in full raid gear including body armor and drawn weapons, swarmed through the house. They found rifles in bedroom closets upstairs and in the basement. They also observed, in the area around Petitioner's house, numerous empty 55 gallon drums, one labelled "sulfuric acid," amidst an ocean of clutter which included abandoned automobiles and other discarded household items. For the next four and a half hours, they occupied the house while awaiting a second warrant based upon the new evidence of weapons and drums. Thereafter, drugs and guns were seized from the house and Petitioner was arrested.

Petitioner filed a motion to suppress the evidence seized from his house as the product of an unlawful warrantless entry.[1] The suppression judge denied this motion, holding that the warrantless entry and search of Petitioner's house and the seizure of evidence were justified by exigent circumstances. He held that:

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1. Petitioner also argued that the search warrant obtained on March 29 was devoid of probable cause in that it contained no information establishing the reliability of the confidential informant, was stale, and was invalid under *Franks v. Delaware*, 438 U.S. 154 (1978), in that it contained numerous material reckless or deliberate misrepresentations and omissions. Petitioner also challenged the second search warrant, obtained following the warrantless entry and search of his house.

> [T]here was an exigent circumstance for the location of Mr. Volpe and assurance that he would not pose a physical threat to the safety of the officers authorized to search the trailer home.

(316a-317a.)[2]

Petitioner also filed a motion to produce the confidential informant whose information formed the basis of the search warrant application. Petitioner contended that the allegation in the affidavit that the informant identified the trailer was a fabrication used to justify the search of a place believed by the agents to be the Petitioner's home.

The informant had never provided information to law enforcement officers previously and was unknown to the agents until she allegedly approached them on December 15, 1994. According to the affidavit, the confidential informant was herself involved in selling methamphetamine and had made the acquaintance of one Robert L. Griffin. On three occasions between September and Thanksgiving of 1994, the informant allegedly accompanied Griffin from the garage of his business to Tony Pastore's auto repair garage, where Griffin picked up cash. The informant and Griffin then travelled to Nicholas Pastore's property, where Griffin and Nicholas Pastore unloaded a brown cardboard barrel and took it into a building attached to the back of a house. At this location, it is alleged that Griffin gave the cash to Nicholas Pastore. The confidential informant and Griffin then left Nicholas Pastore's house and went to the house of "Tony" in Upper Black Eddy, Pennsylvania. Griffin went into the house and returned with drugs. The informant

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2. Citations to the record refer to the Appendix filed in the Third Circuit Court of Appeals.

and Griffin then returned to Griffin's garage. The informant stated that she made this same trip again in early October 1994 and on the Wednesday before Thanksgiving in 1994. (347a-368a.)

The informant furnished no other information regarding "Tony." She never saw him and was unable to furnish his description or a last name. Nor did she furnish a description of the property to the agents or provide an address or even a street name. She told them only that "Tony's property" was approximately 15 to 20 minutes from Nick Pastore's property. Testimony at the suppression hearing established that this limited description did not fit Petitioner's property, which is less than a 3 minute drive from the Pastore property.

The affidavit in support of the application for search warrant recited that the agents "later identified" Anthony Volpe, III as "Tony." The manner in which they did this was not stated in the affidavit. At the suppression hearing, the DEA agent testified that he suspected that "Tony" was Anthony Volpe, III, based upon some unspecified "information from my office and also the FBI that Tony Volpe was involved in the distribution of meth . . . ." (63a.) Based upon this suspicion, the agents searched real estate records for property in the name of Volpe. They found a property at 366 Lake Warren Road, Upper Black Eddy, Pennsylvania, which was recorded as being owned by Anthony J. Volpe, Jr., and Ann L. Volpe. On March 8, 1995, the agents allegedly drove the confidential informant, at night, to the property address which they secured from public records. According to the affidavit, the informant pointed out "'Tony's' house at 366 Lake Warren Drive, Upper Black Eddy, Pennsylvania."

Subsequently, the agents returned to the property without the informant and photographed a trailer, not a house, which

they attached to the affidavit by way of a description of the place to be searched.

The trailer for which the agents secured a search warrant is approximately 100 feet from the nearest paved road and is accessed by means of an unpaved driveway through heavy woods. Only a small part of the trailer, under the best of conditions, can be seen from the road on very careful observation.

Testimony at the suppression hearing established that the trailer which the agents alleged was identified by the informant on March 8, 1995, could not have been the place which she allegedly visited between September and November of 1994. The trailer did not exist then. Petitioner's son purchased the trailer on December 13, 1994. It was delivered to the property between December 13 and December 23, 1994. (224a-225a, 431a-444a.)

Petitioner contended that these facts constituted a substantial preliminary showing that the allegation in the affidavit concerning identification of the trailer by the informant was a deliberate or reckless material misrepresentation.

Petitioner demonstrated numerous other material misrepresentations and omissions in the warrant application. The affiant represented that the confidential informant had "been inside of the locations which are the subject of this warrant." He later admitted in sworn testimony that this was a misstatement. (59a.)

The affiant admitted that he knew, but failed to advise the magistrate, that the property to be searched was not a 15 to 20 minute drive from another location identified in the warrant. (111a-112a.)

The affiant misrepresented to the magistrate that the information from the anonymous confidential informant was corroborated by surveillance and by extensive independent investigation. In fact, no surveillance was conducted and there was no corroboration of the informant's tip other than a recitation of information secured from public records.

The affiant omitted from the affidavit any description of the property which would have alerted the magistrate to the fact that its identification in the manner alleged in the affidavit was highly implausible.

Petitioner contended that these facts raised a substantial issue of whether the informant identified the property or whether that allegation was fabricated by the affiant, and that an examination of the confidential informant, in open court or *in camera*, was required.

The identity of the confidential informant had already been discovered by the defense; only her whereabouts were unknown.[3]

The suppression judge denied the motion to produce the informant, stating that he had "no interest in talking to that person . . . ."

Petitioner thereupon entered a conditional plea of guilty, pursuant to Federal Rule of Criminal Procedure 11(a)(2) to one count of possession of methamphetamine with intent to distribute, 21 U.S.C. § 841(a), one count of possession of a machine gun, 18 U.S.C. § 922(o), and one count of forfeiture, 28 U.S.C. § 853. On March 26, 1996, Petitioner was sentenced to a mandatory minimum term of 20 years of imprisonment.

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3. The informant was paid by the DEA and relocated prior to the suppression hearing.

The court rejected Petitioner's contention that he qualified under 18 U.S.C. § 3553(f) and its Guideline counterpart, U.S.S.G. § 5C1.2, for relief from the mandatory sentencing provisions. The sentencing judge held that Petitioner failed to meet the second criterion of the safety valve provision in that he possessed firearms "in connection with" the offense.

REASONS FOR GRANTING THE WRIT

In holding that the warrantless entry and search of Petitioner's house was justified by exigent circumstances, the trial court and the Third Circuit Court of Appeals have expanded this exception to the warrant requirement of the Fourth Amendment to a degree unprecedented in any reported opinion in this area of jurisprudence. This holding conflicts in principle with relevant decisions of this Court.

The denial of Petitioner's motion to produce the confidential informant conflicts in principle with the relevant decisions of this Court and with the decision of another United States Court of Appeals.

The refusal to afford the Petitioner the relief provided by the "safety valve" provision of 18 U.S.C. § 3553(f) and U.S.S.G. § 5C1.2 presents an issue of statutory construction which is of broad and compelling importance in the law of sentencing.

I.

THE EXPANSION OF THE EXIGENT CIRCUMSTANCES EXCEPTION TO THE FOURTH AMENDMENT WARRANT REQUIREMENT BY THE COURT OF APPEALS IS UNPRECEDENTED AND CONFLICTS IN PRINCIPLE WITH THE RELEVANT DECISIONS OF THIS COURT.

> Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizens and the police. This was not done to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals . . . We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative.

McDonald v. United States, 335 U.S. 451 (1948) at 455-456.

Of all of the privacy interests protected by the Fourth Amendment, none is more sacred than the home. The most basic constitutional rule in this area is that warrantless searches of the home are *per se* unreasonable under the Fourth Amendment, subject only to a few specifically established and well delineated exceptions. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Katz v. United States*, 389 U.S. 347 (1967).

Thus, even where police are lawfully in a house pursuant to an arrest warrant, this Court has steadfastly restricted the scope of a warrantless search incident to arrest to the area from which the arrestee might obtain a weapon or destroy evidence. *Chimel v. California*, 395 U.S. 755 (1969).

The search complained of here was not a search incident to arrest. It was, rather, a search incident to another search. These agents had a search warrant, not an arrest warrant. Search warrants are directed, not at persons, but at property where there is probable cause to believe that instrumentalities or evidence of crime will be found. *United States v. Tehfe*, 722 F.2d 1114, at 1117-18 (3rd Cir. 1983).

> A [search] warrant is not a general hunting license, nor is it a mantle of omnipotence, which cloaks its holders in the King's power to "do no wrong."

United States v. Reilly, 76 F.3d 1271 (2d Cir. 1996).

The suppression court approved the warrantless entry and search of Petitioner's house in this case. It held that officers who secure and execute a search warrant for one residence are authorized to seek out the person to whom they mistakenly believed the residence belonged and to enter and secure that person's home in order to protect their own safety during the search of the first residence. No case has ever so held. This holding, if permitted to stand, creates an entirely new exception to the Fourth Amendment warrant requirement. This Court should grant the writ in order to reverse a new and enormous encroachment on the Fourth Amendment.

II.

THE REFUSAL TO ORDER THE PRODUCTION OF AN INFORMANT WHOSE IDENTITY IS ALREADY KNOWN CONFLICTS IN PRINCIPLE WITH PRIOR HOLDINGS OF THIS COURT, AND AT LEAST ONE OTHER COURT OF APPEALS.

In *Roviaro v. United States*, 353 U.S. 53 (1957), this Court definitively set forth both the scope and purpose of what is commonly referred to as the "informer's privilege." The Court stated that the purpose of preserving the anonymity of citizens who communicate their knowledge of crimes to law enforcement officials is to encourage them to come forward and perform that obligation. Given this purpose, the scope of the privilege becomes clear.

> Thus, where the disclosure of the contents of the communication will not tend to reveal the identity of an informer, the contents are not privileged. Likewise, once the identity of the informer has been disclosed to those who have cause to resent the communication, the privilege is no longer applicable. A further limitation on the applicability of the privilege arises from the fundamental requirements of fairness. Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way.

Roviaro, *supra*, at 60-61.

Petitioner, at the time of the suppression hearing, had discovered the identity of the informant, and so informed the court. (310a.)

In addition, Petitioner demonstrated that the contents of the informant's communication, if any, was essential to a fair determination of the issue of probable cause for the warrant.

Petitioner made a substantial challenge to the warrant affidavit, within the meaning of *Franks v. Delaware*, 438 U.S. 154 (1978). Petitioner demonstrated that the warrant was cleverly crafted to mislead the magistrate in numerous particulars. As regards the information attributed to the informant, Petitioner demonstrated that the trailer which she allegedly identified was not in existence on the dates when the informant was alleged to have been to this property.

It cannot be doubted that, under these circumstances, fundamental fairness required that an inquiry be made of the informant to determine exactly who selected this trailer as the place to be searched, and the manner in which that occurred.

Here, the balance between the interest of the government in protecting the identity of an informer as against the need of Petitioner to have the informant's testimony is not close. Given that the informer's identity was known, there is no weight on the government's side of the scale. On the other side of the scale, Petitioner's entire defense rested upon information which could only be secured from the informant. The informant's testimony could have established that she never identified this trailer, or she might have testified affirmatively that this was not the place to which she had been. This direct and succinct inquiry of the informant could have been made by the court *in camera*, rather than in open court, thereby imposing virtually no burden on the privilege asserted by the government.

At least one court of appeals has reconciled the right of a defendant as announced in *Franks v. Delaware*, *supra*, with the "informer's privilege" in exactly this manner. See *United States v. Kiser*, 716 F.2d 1268 (9th Cir. 1983). Approval by this Court of the procedure adopted by the Ninth Circuit would serve broad and important interests in insuring the fundamental fairness and integrity of criminal proceedings, protecting an accused from the possibility of serious police misconduct, and at the same time, protecting the government's interest in preserving the anonymity of the informant under appropriate circumstances.

This Court instructed trial courts to balance the public interest against the defendant's right to prepare a defense. *Roviaro*, at 62. Yet, four decades later, trial courts continue to incline toward what approaches a *per se* rule of non-disclosure once the magic talisman of "confidential informant" is invoked by the government. It is respectfully submitted that the grant of certiorari here is necessary in order to reaffirm this Court's instruction.

III.

THE WRIT SHOULD BE GRANTED IN ORDER TO PROVIDE SENTENCING COURTS WITH PROPER GUIDANCE IN INTERPRETING THE "SAFETY VALVE" PROVISION OF 18 U.S.C. § 3553(f).

Petitioner was convicted of one count of possession of methamphetamine with intent to distribute, in violation of 21 U.S.C. § 841(a). The quantity of methamphetamine seized exceeded 100 grams, thereby subjecting Petitioner to a mandatory minimum term of not less than 10 years pursuant to 21 U.S.C. § 841(b).

The mandatory minimum penalty of 10 years is increased

to 20 years under § 841(b) if the defendant has a prior conviction for a felony drug offense. In 1989, Petitioner pled guilty in New Jersey to simple possession of a small quantity of methamphetamine. This offense was not a felony under New Jersey law, which does not use such classifications. Under both federal law, 28 U.S.C. § 844(a), and Pennsylvania law, 35 Pa. Stat. A. § 113(a)16, this offense would have been a misdemeanor. For purposes of the sentencing enhancement provisions of 21 U.S.C. § 841(b), however, this prior offense was considered to be a "felony drug offense" as defined in 21 U.S.C. § 802(43), which requires only that the offense be punishable by imprisonment for more than one year under any law of the United States or of any state. Under New Jersey law, the offense was punishable by imprisonment in excess of one year.

18 U.S.C. § 3553(f) relieves a defendant of these mandatory sentences under certain conditions and permits the sentencing judge to impose, instead, a sentence in conformity with the Sentencing Guidelines. Petitioner's Sentencing Guideline range was 135 to 168 months.

The sentencing judge held that Petitioner was not entitled to the relief from mandatory sentences provided by this statute because he failed to meet the second condition, which requires that:

> The defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another to do so) in connection with the offense.

18 U.S.C. § 3553(f)(2).

Petitioner was a collector of guns for over 25 years. Approximately 111 suspected firearms were seized from his home. They ranged from antique and exotic to modern. Many were broken, incomplete, and inoperable. Some had their barrels plugged so as to be permanently unusable. Others were handmade weapons consisting of a combination of parts which Petitioner had assembled himself. Included in the seizure were reproductions of early percussion revolvers and numerous replicas and reproductions.

The Bureau of Alcohol, Tobacco and Firearms concluded that 19 of the seized items were "firearms." The remainder were either antiques, replica collector's items, unserviceable, or collections of parts which were found not to be "weapons."

To be sure, the seized items included operable rifles and shotguns and handguns of varied descriptions. Many were seized in their original molded cases. None of the weapons had ever been employed criminally by the Petitioner. Petitioner has no history of violence, with or without weapons.

No evidence was offered by the government that Petitioner's weapons were used in connection with the offense of conviction, or with any offense. Indeed, no evidence regarding the offense of conviction itself was offered other than Petitioner's possession of drugs of a quantity which raise a presumption of an intent to distribute.

Nevertheless, the sentencing judge stated:

> The court finds that he was engaged in methamphetamine distribution and that he had weapons that were available to him, therefore in his possession to use in connection with protecting or promoting that

> drug business. That also his collect — the two worlds of Mr. Volpe could exist at the same time; possession of firearms in connection with the offense and also a love of weapons, dangerous weapons. His genteel [sic] nature does not foreclose the possible use of such weapons or any one of them for illegal purposes.

(501a-502a.)

The sentencing court thus construed the statutory language "in connection with" to be synonymous with "simultaneously possess." The meaning of the words "in connection with" in the context of the "safety valve" provision of 18 U.S.C. § 3553(f) and its Sentencing Guidelines counterpart, U.S.S.G. § 5C1, has not yet been addressed in any published opinion. The construction of this language will undoubtedly create difficulties for lower courts absent a definitive pronouncement from this Court.

In *Bailey v. United States*, __ U.S. __, 116 S. Ct. 501, 133 L. Ed. 2d 472 (December 6, 1995), this Court reiterated the familiar principal of statutory construction that words under examination "must be given [their] ordinary or natural meaning." *Id.*, 133 L. Ed. 2d at 481. In *Bailey*, the word "use" in relation to firearms under 18 U.S.C. § 924(c)(1) was under examination. This Court went on to state that:

> [H]ad Congress intended possession alone to trigger liability under § 924(c)(1) it easily could have so provided. This obvious conclusion is supported by the frequent use of the term "possess" in the gun crime

> statutes to describe prohibited gun-related conduct.

Id., at 480.

The Court of Appeals for the Third Circuit has already determined the ordinary and natural meaning of "connection." In *United States v. Brannan*, 74 F.3d 448 (3rd Cir. 1996), the court stated, in interpreting U.S.S.G. § 2K2.1(b)(5):

> Thus, "connection" . . . is defined as a "causal or logical relation or sequence." *Webster's Ninth New Collegiate Dictionary 278* (1990).

Brannan, at 453.

Yet, in the instant case, the Third Circuit refused to apply this definition to the statute and Guidelines section under examination.

It is respectfully submitted that the analysis employed by this Court in *Bailey* regarding the intent of Congress applies with equal force here. Congress must be deemed to have required a causal or logical relationship between a firearm and the offense of conviction before a person can be disqualified from the benefit of statutory relief from the mandatory minimum sentence. Possession alone, which is coincidental with the commission of the drug offense in time or place, was clearly not intended to have this effect.

Further support for the contention that more than mere possession is required comes from another section of the Guidelines which were also applied to Petitioner. Petitioner's Guideline range was enhanced pursuant to U.S.S.G.

§ 2D1.1(b)(1), which provides for a two level increase in the base offense level in drug cases where "a dangerous weapon (including firearm) was possessed." Under this section of the Guidelines, there is clearly no requirement for proof of any connection between the weapon and the offense, and Petitioner did not challenge this enhancement below. The contrast in wording between these two sections makes clear that "in connection with" is not mere surplusage.

To hold otherwise would be to require a defendant to prove a negative. If mere possession is deemed sufficient to disqualify a defendant from relief under § 3553(f), the government would receive the benefit of a presumption of a causal relationship, and it would fall to the defendant to attempt to disprove the presumption of connection. It would be the rare defendant, if any, who could succeed in meeting this unconstitutionally imposed burden.

It is respectfully submitted that this Court should grant certiorari here in order to definitively construe the statutory language for the benefit of lower courts as well as for the benefit of Petitioner.

CONCLUSION

For the foregoing reasons, this Court should grant review of the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT SUBMITTED NOVEMBER 5, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-1290

UNITED STATES OF AMERICA,

Appellee

v.

ANTHONY VOLPE, III,

Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(Criminal No. 95-cr-00617)
District Judge: Honorable James T. Giles)

Submitted: November 5, 1996

Before: Sloviter, *Chief Judge,* McKee, *Circuit Judge,* and Rosenn, *Senior Circuit Judge*

JUDGMENT ORDER

Defendant appeals from his judgment of conviction and sentence for violating 21 U.S.C. § 841(a), 18 U.S.C § 922(o) and 28 U.S.C. § 853 on grounds that the trial court erred in failing to suppress evidence seized in violation of the Fourth

Appendix A

Amendment, U.S. CONST. amend IV, and that the trial court abused its discretion in its refusal to order that an informant be produced at the suppression hearing, and in its application of 18 U.S.C. § 3553(f).

After careful review of the record and consideration of oral argument, it is

ADJUDGED AND ORDERED that his judgment of conviction and sentence entered on March 26, 1996 in United States District Court for the Eastern District of Pennsylvania be and is hereby affirmed.

BY THE COURT

s/ illegible
Circuit Judge

Attest:

s/ P. Douglas Sisk
P. Douglas Sisk, Clerk
NOV 12 1996

Certified a true copy and issued in lieu
of a formal mandate on December 4, 1996

Teste: s/ P. Douglas Sisk

Clerk, United States Court
of Appeals for the Third Circuit

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA ENTERED FEBRUARY 28, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIM. NO. 95-0617

UNITED STATES OF AMERICA

V.

ANTHONY VOLPE, III

ORDER

AND NOW, this 27th day of Feb., 1996, on consideration of the defendant's motion to suppress evidence and the government's response, it is hereby

ORDERED

that the defendant's motion is denied for the reasons stated at the suppression hearing.

BY THE COURT:

s/ James T. Giles
HON. JAMES T. GILES
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA ENTERED JANUARY 4, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIM. NO. 95-0617

UNITED STATES OF AMERICA

V.

ANTHONY VOLPE, III

ORDER

AND NOW, this 3rd day of Jan., 1996 on consideration of the defendant's motion to produce informant and the government's response, it is hereby

ORDERED

that the defendant's motion is denied.

BY THE COURT:

s/ James T. Giles
HON. JAMES T. GILES
UNITED STATES DISTRICT JUDGE

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA ENTERED JANUARY 4, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL NO 95-617

UNITED STATES OF AMERICA

v.

ANTHONY VOLPE, III

ORDER

AND NOW, this _____ day of _____, 199__, upon consideration of Defendant Anthony Volpe to suppress evidence and statements, and after hearing thereon,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that all evidence seized at the house of Defendant Anthony Volpe be and hereby is SUPPRESSED.

Further ORDERED, that any and all statements made by Defendant Anthony Volpe during the course of the search of his house on March 30, 1995, be and they are hereby are SUPPRESSED.

BY THE COURT:

_____

J.

APPENDIX E — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS

[Commencing at p. 281]

. . . warrant. The issue is whether or not the conduct to protect the officers was unreasonable, so unreasonable as to have violated the 4th Amendment.

MR. SERNOVITZ: I would agree with that statement of the issue.

THE COURT: All right.

MR. SERNOVITZ: Your Honor, I wonder if I might address briefly the disclosure of informant issue. I wonder whether I peaked the Court's interest in that informant, enough to find in your discretion that an in camera examination of that informant, to find out exactly what she told these agents and how she identified this property, is appropriate and necessary in this case.

And in that regard, I have present in court with me by way of an offer of proof Mary Burns, who can testify that we know who this informant is, so there's no legitimate Government interest in protecting her identity. We don't know where she is, don't want to know where she is, but certainly we already know who she is. Therefore, there is very little interest in any further protection, and certainly little Government interest in preventing Your Honor from perhaps an in camera examination of that confidential informant to clear up lots of the nagging problems in this case.

THE COURT: I have no interest in talking to that person in camera. What I have to decide is — I'm confined to [282] the affidavit and the statements of the officers. The confidential informant was not there at the time of the execution of the warrant.

MR. SERNOVITZ: Oh, with regard to the execution, I agree. But with regard to the identification of the property and my argument that the first search warrant does not establish a nexus with Anthony Volpe, if we knew whether the confidential informant really identified that property or whether that property was pointed out to the confidential informant, we would have the entire thing resolved. And the confidential informant, I suggest, could tell us that.

THE COURT: So you would believe the confidential informant?

MR. SERNOVITZ: I believe the confidential informant never pointed out that property, but instead it was pointed out to the confidential informant by the agents and recited in the warrant.

THE COURT: Well, are you saying that the confidential informant never even confirmed that that was the property?

MR. SERNOVITZ: Oh, I think that that's — well, certainly never confirmed the photo, never was shown the photo.

THE COURT: Well, I'm not talking — whether or not in the visit to the property, even if it was asked is that the property, that the confidential informant —

MR. SERNOVITZ: I contend that that —

[283] THE COURT: — never confirmed it?

MR. SERNOVITZ: That's right. I contend that —

THE COURT: Is that your contention?

MR. SERNOVITZ: — it never happened, based on the fact that the trailer she identified was never there at the time. She had no idea where she was, if she was driving around a circuitous route in a dark rural area at night. She couldn't possibly have picked that property out again in a million years. No landmarks, no distinguishing features, and she picks a trailer out in Upper Black Eddy at nighttime? I think it strains credulity, Your Honor.

THE COURT: And what is the Government's position with respect to the defendant's claim of necessity to determine whether the agents pointed the house out to this confidential informant, or made recklessly suggestive statements to the confidential informant?

MR. GOLDBERG: Your Honor, *United States vs. Brown* is right on point. It says that there is a governmental interest in the secrecy of informants, that the defendant has to make a substantial preliminary showing of the affiant's reckless or intentional disregard of the truth. And none of that has been shown. Mr. Sernovitz has lots of speculation as to how the identification happened, but none of that is evidence. The evidence came from Agent Woodcock, and he was asked to describe the event at least three times. He did describe the event [284] three times. There is no indication that there was a reckless or intentional disregard of the truth.

THE COURT: All right. I deny your motion for access to the confidential informant for purposes of this motion. Balancing your interests against the Government's interest as articulated, I find the Government's interests outweigh yours in view of the

testimony that the confidential informant identified the property twice with words, and further by demonstrative conduct, which is corroborative of confirmation, at least in the minds of the officer who was witness to the identification.

So on the record — based upon the record, I do not find that the identification reasonably could be said to have been that of the agent as opposed to the confidential informant. Even if there had been a question asked, what about this house, what about that house, what about that trailer or whatever, I find that the action of the confidential informant in saying that's it, let's get out of here, is sufficiently confirming of an independent identification so as to find that the Government's interests outweigh the defendant's interests for purposes of this motion.

Do you have any further argument in favor of — in support of suppression?

MR. SERNOVITZ: Well, I merely would point out, Your Honor, in graciously accepting the Court's finding of fact on [285] that issue, that if that's so, and if the Court finds that the agents in good faith believed that the drug activity occurred where the informant said it was, it was in that trailer, and that the agents had no business approaching that house. That there aren't any exigent circumstances here which would reasonably justify them entering that house with guns drawn as they did, a house 200 feet away down a wooded gravel driveway, in order to ostensibly protect the search of a trailer, where they already knew they weren't going to find anything incriminating and knew that Mr. Volpe did not reside.

THE COURT: All right. Anything further?

MR. GOLDBERG: No, Your Honor.

Appendix E

THE COURT: My decision is that the motion to suppress is denied for the following reasons. I find that a reasonable magistrate, upon review of the first affidavit, the Woodcock affidavit, would have issued a search warrant in the form issued. There is sufficient detail of asserted first-hand knowledge of confidential informant number one as to drug conspiracy, to lend credence to the probability that that the assertions of connection to this defendant and to the property at 366 West Warren — Lake Warren Drive were reliable.

There were some other allegations of corroboration that may have been helpful, but not necessary to a determination of reliability of confidential informant number one contained within the Woodcock affidavit. The warrant [286] authorized a search of buildings at 366 Lake Warren Drive. The evidence is that there was one mailbox for 366 Lake Warren Drive. The search was executed for the trailer home.

I find that it was reasonable for Agent Sproule to conclude that there was a strong possibility that Mr. Volpe, the defendant, constituted a physical threat to the officers intending to execute a warrant at a property which was alleged to be connected with a substantial methamphetamine enterprise. Given the topography of the property, that is the — of all of the land, and the number of places in this vicinity that could have been used to pose a threat to someone who had a primary interest in the protection of drug proceeds or the drug enterprise, the Court concludes that the identification of the whereabouts of Mr. Volpe was reasonably a paramount concern, prior to a thorough search of the trailer home, which was presumptively the place out of which drugs were distributed by Mr. Volpe, according to the affidavit.

The house, as it has been identified, was not previously

known to the agents and there was no good faith belief that that property called the house was one of the buildings associated with 366 Lake Warren Drive. I find that the agents went to the house based upon information provided by Kathy Volpe that Mr. Volpe, the defendant here, was located there. There was no general search of the house property. There was a question, a good faith question in the mind of [287] Agent Sproule, I find, as to authority to search that house. The warrant states buildings at 366 Lake Warren Drive. Therefore, there was a question as to whether or not this house was a building associated with 366 Lake Warren Drive. I find, though, that there was no search of the property prior to obtaining a search warrant.

The search warrant, the second search warrant, was presented to the magistrate judge with the package plus the first search warrant, that had been presented to the same magistrate judge shortly before the application was made for the second warrant. That affidavit, the affidavit of Dehart, represented that there was located outside of that house — there were located outside of the house drums associated with sulfuric acid and that sulfuric acid is a commonly-used product in the manufacture of methamphetamine. And, further, it was represented that there were drugs — were guns found in the property.

I find that the allegations were based upon — were sufficient for issuance of the second warrant. The drums outside of the house containing sulfuric acid would have been sufficient in conjunction with the other prior allegations in the Woodcock affidavit for issuance of the warrant for the search of the house. So the Court does find that there was an exigent circumstance for the location of Mr. Volpe and assurance that he would not pose a physical threat to the [288] safety of the officers authorized to search the trailer home.

Is there any other issue?

MR. SERNOVITZ: Well, I perceive one, Judge, and that is whether Your Honor, and I hope the Court does, will at least grant that the issues I've presented are substantial enough that they're worthy of preserving for appeal.

THE COURT: What?

MR. SERNOVITZ: I'm sorry, Judge?

THE COURT: I've credited Officer Sproule. That's a credibility determination.

MR. SERNOVITZ: I think the standard of review where the determination is made by the Court rather than by the magistrate judge I think is plenary. I think there's some conclusions that the Court drew —

THE COURT: Well, I agree with you.

MR. SERNOVITZ: — with regard to exigent circumstances and —

THE COURT: Those are my findings and I agree that the defendant should have an opportunity to challenge that review, and the only way to do so is to appeal, and therefore I — even though I've made credibility findings, the defendant has a right to attack the basis for the credibility findings or other findings under the existing law, and the Court's application of the existing law to the facts as found.

All right. The next step is to then proceed with the . . .

* * *

APPENDIX F — RELEVANT STATUTE AND SENTENCING GUIDELINE

18 U.S.C.A. § 3553, Imposition of a sentence

(f) Limitation on applicability of statutory minimums in certain cases. — Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 961, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that —

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. 848; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

U.S.S.G. § 5C1.2 Limitation on Applicability of Statutory Minimum Sentences in Certain Cases

In the case of an offense under 21 U.S.C. §841, §844, §846, §960, or §963, the court shall impose a sentence in accordance with the applicable guidelines without regard to any statutory minimum sentence, if the court finds that the defendant meets the criteria in 18 U.S.C. § 3553(f)(1)-(5) set forth verbatim below:

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the

sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. 848; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.